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No. 296

Supreme Court of the United States

OCTOBER TERM, 1952

ALSTATE CONSTRUCTION COMPANY, *Petitioner*

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NATIONAL SAND & GRAVEL ASSOCIATION AS AMICUS CURIAE

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BRIEF OF NATIONAL SAND & GRAVEL ASSOCIATION AS AMICUS CURIAE

The National Sand & Gravel Association is the national trade association of the sand and gravel industry. The Association, having obtained and filed written consent of counsel for the Petitioner and of the Solicitor General, files this brief *amicus curiae* because of the extraordinary importance to its members of the issue of interpretation of the Fair Labor Standards Act presented to the Court in this case, in *Thomas* v. *Hempt Brothers,* No. 410, and also present in *Johnson* v. *Tobin,* No. 336, pending in the Court on petition for certiorari.

The opinion of the District Court in this case (R. 7-15) is reported at 95 F. Supp. 585. The opinion of the Court of Appeals (R. 66-70) is reported at 195 F. 2d 577. The opinion below in the *Hempt* case is reported at 371 Pa. 383, 89 A. 2d 776, those in the *Johnson* case at 100 F. Supp. 491 and at 198 F. 2d 130.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C. 203, 207(a)) are as follows:

Sec. 3. As used in this Act—

* * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any

other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

QUESTION PRESENTED

This brief is directed to argument of a single question, present in this case, in *Thomas* v. *Hempt Brothers* and in *Johnson* v. *Tobin*. That question is:

> Whether workmen who are engaged in quarrying locally, or in producing from materials quarried or purchased locally, construction materials such as bituminous concrete, gravel and rock, sold and delivered within the state for use by others in local reconstruction, repair and maintenance of interstate highways or other facilities of interstate transportation, are engaged in "production of goods for commerce" within the meaning of the Fair Labor Standards Act, as amended.

STATEMENT OF THE CASE

The facts, so far as relevant to the issue considered in this brief, are as follows:

Respondent brought an action to enjoin Petitioner, Alstate Construction Company (Alstate), from con-

tinuing alleged violations of overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter called "the Act") (R. 1-3).

Alstate is engaged solely in the Commonwealth of Pennsylvania in the production, sale, distribution and application of a bituminous concrete material known as amesite. The amesite is produced at three plants located in the State of Pennsylvania. Except for some asphalt material used at one of the three plants, substantially all the materials used in the production of amesite are quarried or manufactured and purchased in Pennsylvania (R. 8).

The amesite produced by Alstate is disposed of to Pennsylvania customers for use in Pennsylvania (R. 20-21). The greater part of the product is used for constructing, reconstructing, resurfacing and repairing interstate highways. In many cases, Alstate supplies the material under contracts which provide for furnishing both the material and labor necessary for a particular construction, reconstruction or repair job, and in these cases employees of Alstate actually apply the material to the highways. In other cases, Alstate simply sells the material to the Commonwealth of Pennsylvania, its political subdivisions and others for use by them in constructing, reconstructing, resurfacing and repairing highways and other interstate facilities (R. 20-22). Such material may be sold f.o.b. Alstate's plants, or delivered in its own trucks or in the trucks of contract carriers which Alstate pays (R. 10).

The court below held, and it is not now disputed, that some employees of Alstate engaged in the actual reconstruction, resurfacing and repairing of existing

interstate highways and similar instrumentalities are engaged in commerce and covered by the Act (R. 8). The controversy is as to employees not engaged in such activities but employed apart from them in the production of amesite and related activities.

The court below held that all such "off the road" employees, in producing material which is used to repair and maintain the surface of instrumentalities of commerce, are engaged "in the production of goods for commerce" (R. 69), and that they are, therefore, covered by the Act.

As already indicated, the issue is present also in *Thomas* v. *Hempt Brothers,* No. 410 in this Court, and in *Johnson* v. *Tobin,* No. 336 in this Court. In those cases only "off the road" employees are involved. There were no employees engaged in actual repair and reconstruction activities.[1] There can be no question that the issue common to the three cases, as we have presented it, is before this Court.

THE INTEREST OF THE ASSOCIATION

Although there are other issues present in this case, this brief will be directed to the single question stated above. The Association omits discussion of other questions, not because those questions are unimportant for its members, but because in this brief it desires to focus attention on one vital question of general importance to its members, the validity of an interpretation of the key provisions of the Act with respect to coverage which it regards as fundamentally erroneous. That interpretation brings under the Act essen-

[1] In Johnson v. Tobin it was stipulated that none of the products involved were placed by the defendants upon any instrumentality in interstate commerce. (Printed Record, No. 336, p. 26).

tially local operations of local production for local use, disregarding the Congressional intent to leave such operations to local regulation.

ARGUMENT

The decision of the court below, reflecting the position urged by the Administrator,[2] is that employees engaged in local production of construction materials for sale and use locally are nevertheless subject to the Act if the goods are used for repair, reconstruction and maintenance of interstate highways or other instrumentalities of commerce. Respondent urges that the literal terms and plain meaning of the statutory language and controlling decisions of the courts require this result.

It is the purpose of this brief to bring to the Court's attention the fundamental lack of merit in Respondent's position.

Respondent's interpretation actually flies in the teeth of the statutory language. As applied to the practical situation here under consideration, it completely disregards the statutory scheme establishing dual bases for coverage—one for employees engaged in commerce and the other for employees engaged in production of goods for commerce. In so doing, it blandly ignores the Congressional intent which gave rise to this statutory scheme and which has maintained it on amendment and reenactment. And, as might be expected in view of these defects, the

[2] The term "Administrator" is used throughout this brief to designate the official having responsibility for administration of the Fair Labor Standards Act. For an explanation of the transfers and delegations of authority as a result of which suits are brought by the Secretary of Labor, see Section 4 of the Act; Reorganization Plan No. 6 of 1950, 64 Stat. 1265; 16 F.R. 8147.

Respondent's interpretation conflicts with controlling principles enunciated in the decisions of the Court. Moreover, disregard of the statutory scheme in this area leads to incongruous results inconsistent with the Administrator's own valid interpretations applicable to other questions of coverage.

I

THE STATUTORY LANGUAGE AND THE STATUTORY SCHEME EXPRESSED IN THAT LANGUAGE PRECLUDE THE INTERPRETATION ADOPTED BY THE COURT BELOW

A. THE ACT SETS UP TWO TESTS FOR COVERAGE

The critical coverage language reads: "engaged in commerce or in the production of goods for commerce" (Section 7(a)). The distinct character of the coverage asserted by these two phrases is established. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 131; *Schulte* v. *Gangi*, 328 U.S. 108, 119.[3]

The scope of the "in commerce" coverage was authoritatively defined in *McLeod* v. *Threlkeld*, 319 U.S. 491, 494. It covers "every employee in the 'channels of interstate commerce' as distinguished from those who merely affected that commerce."

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[3] The Court of Appeals for the Eighth Circuit stated the point succinctly in Convey v. Omaha National Bank, 140 F. 2d 640, 643-4 (1943), *cert. denied*, 321 U.S. 781:

> "While it is arguable that the establishment of a dual standard is not in consonance with the economic realities which prompted the enactment of the Fair Labor Standards Act, we cannot disregard the definitive language employed by Congress in framing the Act. 'When by definition Congress differentiated between "commerce" and "production of goods for commerce", we may not assume it was wholly without purpose.' Stoike v. First National Bank, supra."

We are not here concerned with employees held by the court below to be covered by the "in commerce" test. The issue is with respect to application to off-the-road employees not engaged in commerce, of the "production of goods for commerce" test, which includes, through the definition of "produced" (Section 3(j)), "any closely related process or occupation directly essential to" such production.

B. THE COURT BELOW AND THE ADMINISTRATOR ASSERT A NEW COMPOSITE COVERAGE

The holding of the court below is framed in terms of the "production of goods for commerce" coverage, the second of the statutory tests, but it is in truth based on a wholly new, composite test, devised by the Administrator.

Although the court below did not spell out the rationale of its conclusion that all off-the-road employees were engaged in "production of goods for commerce," the basis for the conclusion can be ascertained from the arguments advanced by the Administrator and the reasoning of the cases on which the court relied. The crux of the matter is in the meaning of the phrase "for commerce." The Administrator breaks that phrase in two and gives to one or the other or to both words a meaning they clearly do not have in context. Thus, he maintains because the statutory definition of "commerce" itself includes the word "commerce," it must be concluded that the definition includes everything heretofore known as constituting commerce in the Constitutional sense, that is, commerce which Congress has power to regulate; it therefore means, and is synonymous with, all instrumentalities of commerce, as such, regardless of what limiting words or phrases may be used with it in context. See

Fleming v. *Atlantic Co.*, 40 F. Supp. 654, 660 (N.D. Ga. 1941), *aff'd* in 131 F. 2d 518 (5th Cir. 1942). And the dictionary is consulted for definitions of the word "for" which will give to it the widest possible scope, with the assertion that, since the word is a word of ordinary speech, it is "to be given *all* the meaning it has 'in ordinary intercourse in this context.'" See, Memorandum for Respondent on Petition for Writ of Certiorari in this case, pages 9-10. Compare, *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, at 503, which is cited as authority although it omits the crucial word "all" which the Administrator uses.

The net effect of the process of "interpretation" which the Administrator follows is to end up with an entirely new coverage in which "production of goods for commerce" becomes, in the Administrator's own words, "production of goods [necessary] for [instrumentalities of] commerce;" or, "production of goods [to serve as or as a part of, to supply the need of, in order to effect] commerce." Phrased either way, the result of the invention is a composite coverage which, on practical application, reaches a wide area untouched by either test of coverage considered separately.[4]

Viewed broadly, the result is also to read into the

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[4] The composite coverage sought to be achieved by the "necessary to" phrasing of the new coverage was considered and pointedly rejected by the New York Court of Appeals in its carefully reasoned opinion in Stoike v. First National Bank, 290 N.Y. 195, 48 N.E. 2d 482, 485-486 (1943). Judge Bratton exposed the fallacy inherent in the second phrasing of the composite coverage urged by the Administrator in E. C. Schroeder Co. v. Clifton, 153 F. 2d 385, 388-390 (10th Cir. 1946); and Judge Forman used even more emphatic language to dispose of the "for commerce" theory in McComb v. Trimmer, 85 F. Supp. 565, 567, 569 (D. N.J. 1949).

Act an "affecting commerce" test in the face of Congressional rejection of exactly that test, and of expression of Congressional intention not to exercise the full scope of its Constitutional powers in fixing labor standards.

C. THE LEGISLATIVE HISTORY, REFLECTED IN THE PLAIN WORDING OF THE ACT, MAKES THE INTERPRETATION ADOPTED BY THE COURT BELOW WHOLLY UNTENABLE

Extended discussion of legislative history seems unnecessary. The Court, we believe, is fully aware of its significance to the coverage language of the Act. *Kirschbaum* v. *Walling*, 316 U.S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Western Union* v. *Lenroot*, 323 U.S. 490. We consider it, therefore, only for its direct bearing on the new question of interpretation common to the *Alstate, Hempt* and *Johnson* cases, which is here presented to the Court.

The bills which went to conference contained only the "affecting commerce" test. The significance of the shift to dual coverage, of which one branch is "production of goods for commerce," unexplained by the conference Report,[5] appears clearly from the debates on the conference bill.

The debates, insofar as they relate to what Congress intended (as distinguished from what it thought it had the Constitutional power to do), were directed to the proposition that the concern, in covering the production industries into the Act, was to reach these only to the extent that they were part of a *"system which shipped goods in interstate commerce."* See especially

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[5] See H.R. Rep. No. 2738 on S. 2475, 75th Cong., 3d Sess., pp. 29-30 (1938).

Senator Borah, who was one of the chief proponents of exercising the commerce power so as to cover activities connected with production of goods. 83 Cong. Rec. 9166-9173, 75th Cong., 3d Sess. How better than by use of the phrase "production of goods for commerce" could Congress have framed the over-all idea expressed by the interchange between Senators Bailey and Borah on the floor of the Senate when the conference bill was debated? (83 Cong. Rec. 9167, 75th Cong., 3d Sess.)

> "MR. BAILEY. * * * Commerce is intercourse. It is not industry. I think the Senator will agree with me about that. I have heard him argue to that effect in this Chamber many times.
>
> MR. BORAH. I do not disagree with the Senator, that if an activity is within intrastate commerce, we may not deal with it. However, if the activity is interstate commerce, and the wage earner is engaged in work *which results in shipment in interstate commerce,* that is a wholly different question.
>
> MR. BAILEY. The Senator is coming down to commerce. Let us keep the question between us clear. Suppose I am working in a cotton mill in North Carolina. The cotton mill sells goods across the State line. Does that fact put me in commerce? If it does, that is a new doctrine in the Senate, and a new doctrine in America. The railroad worker is in commerce, because the railroad is an instrumentality of commerce. However, I think the Senator from Idaho, whose learning in the matter of the Constitution and the law is extraordinary and admirable and is profoundly respected by me, under all circumstances, as he knows, will agree that it has always been held that the man in the mill is not in commerce just because the mill sells

its goods in commerce. Am I not correct in that statement?

MR. BORAH. Certainly, if the Senator limits the question as he does. However, if the man in the mill is engaged in producing a commodity which is shipped, and *the entire operation of production and shipment is one transaction,* as was held in the Jones and Laughlin case, then I maintain that it is in interstate commerce.

MR. BAILEY. Does the Senator contend that the man is working in interstate commerce?

MR. BORAH. *If he is working in the production of goods which are being prepared for interstate commerce, and it is part of the system to ship the goods in interstate commerce, the whole transaction is interstate commerce,* as was held by the court in the Jones and Laughlin case."
(Emphasis supplied.)

Against such a background, the key to the scope and meaning of the statutory phrase "production of goods for commerce" is clear. The exercise of the commerce power under that phrase was to reach the activities in the production industries only if those activities were part of a total effort intended ultimately to place goods in the stream of commerce.

Other factors in the specific background of the coverage provisions give content to the legislative purpose. Congress had immediately in mind the then-recent decision in the *Jones & Laughlin* case (301 U.S. 1) in which its power over unfair labor practices "affecting commerce" had been sustained in its application to the *productive processes* of industry. 83 Cong. Rec. 7433-4, 9166, 75th Cong., 3d Sess. Congress also had before it the case history of the phrase "in commerce" from such acts as the Federal Em-

ployers' Liability Act which regulated the common carrier industries (Act of April 22, 1908, 35 Stat. 65, § 1). See, 83 Cong. Rec. 7434, 75th Cong., 3d Sess.; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132; and, see, *10 East 40th Street Building* v. *Callus*, 325 U.S. 578, 579.

From its earliest decisions the Court has recognized that the selection of language asserting a dual basis of coverage—one in terms of activity "*in* commerce", the other in terms of "*production of goods for* commerce"—in the law as enacted, is the articulation of an unmistakable intent to establish two branches of coverage with distinct practical functions in the operation of the law, and together asserting a narrower coverage than would an "affecting commerce" standard.[6]

The Court has recognized, likewise, that the statutory scheme serves to effectuate Congressional intent, clearly expressed in the legislative history, to leave untouched essentially local activities. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 570, citing legislative history; *10 East 40th Street Building* v. *Callus*, 325 U.S. 578, 582. The fundamental purpose to leave local operations to the states was emphatically reaffirmed when Congress enacted the 1949 amendments to the Act. H.R. Rep. No. 1453 on H.R. 5856, 81st Cong., 1st Sess. 14-15 (1949).

Both this Court and the lower appellate courts have, in the empirical process demanded for application of the coverage phrases, consistently recognized and applied the principle that coverage under the "production for commerce" test is necessarily founded on

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[6] The Court observed in McLeod v. Threlkeld, 319 U.S. 491, 493, "The selection of the smaller group was deliberate and purposeful."

the actual or anticipated *movement of goods in commerce as the end result of the productive process* of which a particular employee is a part. See, e.g., consideration of legislative history and holdings in *United States* v. *Darby*, 312 U.S. 100, 113, 117; *Kirschbaum* v. *Walling*, 316 U.S. 517, 520-523; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567-580. In *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, 513, the Court described as a "jurisdictional fact" the circumstance that "at the time the [goods] were produced they were intended for interstate transportation." And see, *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 663-664; *Western Union* v. *Lenroot*, 323 U.S. 490, 503, 506; *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385, 388 (10th Cir. 1946), *cert. denied*, 328 U.S. 858; *Engebretzen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (7th Cir. 1945); *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (4th Cir. 1943); *Johnson* v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (5th Cir. 1942), *cert. denied*, 318 U.S. 790.

It is abundantly clear from the foregoing discussion that "commerce", as used in the Act, does not mean commerce in the sense of everything within the scope of Federal power to regulate, including instrumentalities of commerce[7] and all activities affecting commerce. Nor does "for" mean "to serve as or as a part of, to supply the need of, in order to effect". To interpolate thus the statutory phrases is to wipe out at one stroke the clearly defined dual bases of coverage

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[7] Even when the scope of Federal power over commerce is in issue the physical facilities or instrumentalities of transportation, communication or transmission are not treated as themselves being "commerce". See, *e.g.*, Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 267; Cleveland etc. R.R. v. Backus, 154 U.S. 439, 445; Reading R.R. v. Pennsylvania, 82 U.S. 284, 294.

established by the Act, and substitute a test not distinguishable from the "affecting commerce" test specifically rejected by Congress.

Commerce in the Act means transportation or communication or transmission as a function or operation or movement interstate. The coverage established by the "production of goods for commerce" test extends, whether directly or indirectly, only to those employee activities which, when they take place, are intended to contribute toward placing goods ultimately into the stream of commerce.

In this case and in the *Thomas* and *Johnson* cases, this essential condition to coverage is lacking. The only goods involved never move in the stream of commerce. The employees who produce them are not covered by the Act.

II

RESPONDENT'S PRESENT INTERPRETATION OF THE ACT, WHICH IS A REVERSAL OF PRIOR LONG-STANDING INTERPRETATIONS, IS NOT SUPPORTED BY THE CASES ON WHICH HE RELIES

For some seven years after the passage of the Act the Administrator interpreted it as not applying to off-the-road employees of the kind with which we are concerned. In a series of interpretations between 1938 and 1943, he repeatedly recognized that the plain meaning of the statute was that production of goods for commerce meant production for movement in commerce.

Thus, Interpretative Bulletin No. 5, Release R-113, originally issued December 2, 1938 contained the following (see BNA 1944-5 Wage-Hour Manual, p. 19):

> "2. The wage and hour provisions of the Act are applicable to employees 'engaged in (interstate)

commerce or in the production of goods for (interstate) commerce.' Employees are engaged in the production of goods '*for* commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the act. * * *"[8]

On July 15, 1939, in answer to a direct inquiry made by the Executive Secretary of the Association, Mr. Bauh, then Chief of the Opinion Section, stated for the General Counsel:

"Your letter raised the question whether the Fair Labor Standards Act, a copy of which is enclosed, covers employees engaged in the production of sand and gravel which is sold and used within the state of production in the repair or reconstruction of interstate highways. In his letter to Mr. Egan, Inspector Hill took the position that employees engaged in such activities were entitled to the benefits of the statute.

"This office has carefully considered the matter and is of the opinion that under the circumstances outlined the employees in question are outside the scope of the Act. They are not 'engaged in commerce' since their operations are of a local nature and are distinct from the operations of the repair and maintenance of interstate highways. Furthermore they are not engaged 'in the production of

[8] Compare later version, 29 Code Fed. Reg. § 776.7(b) (supp. 1947).

goods for commerce,' since the goods they produce do not move across state lines. Neither, in our opinion, are they engaged in a 'process or occupation necessary to the production' of goods (for commerce) within the meaning of Section 3(j) of the Act."

On May 15, 1941, the Administration in a formal release directed specifically to this industry (G-162, see BNA 1944-5 Wage-Hour Manual, p. 36) stated (Par. VI):

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce *do not become subject to the Act merely by reason of the use to which such products are put.* * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce. * * *" (Emphasis supplied.)

As late as November, 1943, L. Metcalfe Walling, Administrator of the Wage-Hour Division, in response to a question directed to him by the Association, stated that Release G-162 "still represents the views of the Division."

It was not until Release A-14, promulgated on March 13, 1945 (see 29 Code Fed. Reg. § 776.17(c), 1949 ed., supp. 1951) that the Administrator reversed his position. It is worthy of note that in some of his presently effective interpretations he still appears to recognize that coverage under the "production of

goods for commerce" test depends upon whether goods are sold or shipped in commerce. See Interpretative Bulletin, General Coverage[9] (cited herein by this short-form title), 29 Code Fed. Reg. §§ 776.15(b) and 776.16(b).[10]

The Administrator justified his original change of mind and still seeks to support his interpretation on the basis of the so-called "Ice cases". The decisions in those cases do not support his interpretation. Rather, they are wholly consistent with the preceding analysis. *Hamlet Ice Co.* v. *Fleming*, 127 F.2d 165 (4th

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[9] Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, Part 776, Subpart A, General, May 1950, 29 Code Fed. Reg. Part 776 (1949 ed., supp. 1951).

[10] The Administrator recognizes that he is precluded by Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, from now urging that what a carrier does in transporting or transmitting goods in transit in interstate commerce is "production of goods for commerce." Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.15(b). It is of significance in evaluating the position taken by the Administrator in the instant cases, to observe that if the Court had accepted the interpretation proposed by the Administrator in the Lenroot case, he would now be in a position, without resort to the "for commerce" theory now urged, to test the coverage of off-the-site employees here under the "production of goods for commerce" phrase. In other words, if the Court had gone along with the Administrator's theory on the interpretation of "produced" in the Lenroot case, all activities of persons whose work might be found to be "closely related" or "directly essential" to carrying of goods in their interstate movement (but not the employees here involved, see *infra* pages 23-24) would have been covered into the Act under the "production of goods for commerce" test. If this had occurred, all distinction, for practical purposes, between the "in commerce" test and the "production for commerce" test would have been wiped out. This, the Court noted expressly and refused to do. 323 U.S. at p. 504.

Cir. 1942), *cert. denied*, 317 U.S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (5th Cir. 1942); *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (6th Cir. 1943), *cert. denied*, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (6th Cir. 1946); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P. 2d 896 (App. Cal. 1944).

In the *Hamlet* case, an ice company in North Carolina sold substantial quantities of ice to three interstate carriers by rail—the Fruit Growers Express Co., the Seaboard Railroad, and the Railway Express Agency. The ice was used in icing cars and shipments. In the words of the court (p. 167), "The Ice Company has knowledge at the time the ice is produced that it will move in interstate commerce." The Ice Company, however, contended that because *it* sold the ice within North Carolina, that *it* therefore engaged in no interstate commerce, and the later interstate commerce was irrelevant because it was by another, who was the ultimate consumer. The Court refused to regard the flow of production as thus divisible into separate stages wholly insulated from each other. Congress, the Court stated, was concerned with the production of goods "for" commerce (127 F. 2d at 169), and this ice was such goods. The Court added (*ibid.*):

> "The Supreme Court had no occasion to define the precise limits of the phrase 'production for commerce', but there can be no doubt that it relates to all goods that are expected to be transported in interstate commerce whether they are to be shipped by the maker or by some one else."

The technical argument that because the purchaser was the ultimate consumer the ice ceased entirely to be "goods", the Court simply refused to take seriously.

The same consideration was present in the *Atlantic* case. There, although the court generally rested its decision upon an approval of the opinion in the *Hamlet* case, it said (131 F. 2d at 521):

> "* * * The fact of which appellant makes so much, that the ice produced for, and being transported in, interstate commerce has the inherent defect of perishability and is, in the course of its use, consumed, is entirely without effect, we think, upon the proposition that ice is goods, is produced for commerce, and moves in commerce."

The *Chapman* and later cases were based upon similar facts, and relied upon the *Hamlet* and *Atlantic* decisions.

The significant fact in the ice cases, therefore, is that the ice was produced for commerce, and moved in commerce. There would be nothing about the cases at all out of the ordinary except for the rather ingenious argument that the instrumentality of commerce, by being the consumer, actually insulated the producer against this movement in commerce. That argument having failed, the case was simply the ordinary one, now commonplace, where title to goods changes in the course of the movement out of the state. No court has had difficulty in concluding that the vagaries of the title are not determinative. *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (5th Cir. 1942), *cert. denied*, 316 U.S. 704. See Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.20(d).

The Administrator relies also on *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (5th Cir. 1946). This and other electric power cases involve a wholly different principle. As it is produced locally the power is applied to the active functioning of the transporta-

tion or transmission facility through a direct physical connection and enters into the actual operation of transporting or transmitting. It is in truth an operating part of the movement of commerce. The Tenth Circuit Court correctly observed in *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (1944), that electric power is as much a functional element in the movement of goods as bridges and tracks and is to be tested by the "in commerce" coverage when it is utilized in the operations of instrumentalities of commerce. The Administrator himself has, since 1942, regarded the employment involved in this situation as covered under the "in commerce" test. Administrative Interpretation, Release R-1789, April 20, 1942, see BNA 1944-5 Wage-Hour Manual, p. 24; Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.11.

The issue of coverage of employees such as those here involved has been in litigation ever since the promulgation of Release A-14 in 1945.[11] The analogy of the ice and electric cases has been repeatedly urged. It was first presented in *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (10th Cir. 1946), *cert. denied*, 328 U.S. 858, and emphatically rejected in an opinion written by Judge Bratton.[12] It was similarly rejected in *Mc-*

[11] Compliance with the Administrator's interpretation, such as appears in Thomas v. Hempt Brothers, indicates not acquiescence in the interpretation but unwillingness to run the very substantial risks created by non-compliance. *Cf.* dissenting opinion in that case, 371 Pa. at 396, 89 A. 2d at 782, printed record in No. 410, p. 28.

[12] Judge Phillips concurred in the conclusion that the employees involved in the branch of the case presenting the Administrator's new theory were not covered but did so upon the ground that the construction involved was new construction. The third judge dissented. See the discussion of this case, *infra* pages 23-25.

Comb v. *Trimmer*, 85 F. Supp. 565 (D.N.J. 1949); *McComb* v. *Turpin*, 8 Wage-Hour Cases 408, 412, 413 (D. Md. 1948); *Wiley* v. *Stewart Sand & Material Co.*, 206 S. W. 2d 362 (Kansas City Court of Appeals, Mo. 1947); and *Ramos* v. *Puerto Rico Cement Corp.*, 5 Wage-Hour Cases 956 (D. P.R. 1946); see, also, *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn. 1943). The Supreme Court of Pennsylvania rejected it again in the *Thomas* case.

It was not until after this Court's decision in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, that the Administrator's position was finally accepted by any judicial authority. *McComb* v. *Carter*, 8 Wage-Hour Cases 498 (E.D. Va. 1948). The Court in that case apparently relied, as the court below and the Eighth Circuit in the *Johnson* case clearly did, upon the language of the *Roland* opinion that coverage does not require the employee to be employed in the production of an article which itself becomes the subject of commerce. Of course, in so relying, those courts ignored one of the fundamental distinctions which we have pointed out. The employees in the *Roland* case admittedly did not produce goods which moved in commerce. The sole question was whether they were covered under the indirect test contained in the definition of production because engaged in an occupation "necessary for" production by others of goods which would move in commerce. Until there is production by someone of goods that move in commerce, that test, and the language of the *Roland* case relating thereto cannot come into play.[13]

[13] The opinion of the Supreme Court of Pennsylvania in Thomas v. Hempt Brothers suggests that a different rationale was adopted by the court below in this case. It interprets that opinion as

In this case, that fundamental requirement is not met.

III

THE BASIC UNSOUNDNESS OF THE INTERPRETATION ADOPTED BY THE COURT BELOW APPEARS FROM THE INCONGRUITIES AND INCONSISTENCIES WHICH NECESSARILY RESULT FROM ITS PRACTICAL APPLICATION

Consideration of the practical implications of the interpretation adopted by the court below demonstrates its basic unsoundness. It leads immediately to capricious results, clearly inconsistent with Congressional intention. The Administrator's existing interpretations disclose that there is here presented a new and broad principle of coverage, the potential scope of which is subject to no definite limits.

A. THE SCHROEDER CASE AND THE LEGISLATIVE HISTORY OF THE 1949 AMENDMENTS

In considering the 1949 Amendments to the Act, Congress had before it the questions of coverage presented in *E. C. Schroeder Co.* v. *Clifton,* 153 F. 2d 385 (10th Cir. 1946), *cert. denied,* 328 U.S. 858, discussed *supra* page 21. That case involved two distinct questions of coverage, one relating to activities of employees producing crushed stone and gravel used for

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meaning that since goods in commerce were hauled over the highways repaired and maintained with materials furnished by the off-the-road employees, those employees were covered because engaged in an occupation closely related and directly essential to the production of goods. This rationale cannot stand in view of this Court's holding in Western Union Telegraph Co. v. Lenroot, *supra* note 10, that activities of employees of a carrier in transporting goods in commerce are not production within the meaning of the Act.

relocated portions of an interstate railroad and highway. As to these employees, coverage was claimed on the principle here in issue. A majority of the court held that they were not covered.

The other branch of the case related to similar employees producing stone to be used in construction of a dike protecting a producing oil field from flooding by the waters of a lake. A majority of the court held that these employees were covered because engaged in an occupation necessary for production of the oil which was to move in commerce.

In discussing the amendment of the definition of "production" (Section 3(j)) which narrowed the indirect coverage by changing the language "any process or occupation necessary to production" to read "any closely related process or occupation directly essential to production", the Managers on the part of the House made the following statement with reference to the *Schroeder* case, H.R. Rep. No. 1453, 81st Cong., 1st Sess. 15 (1949):

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:
>
> * * *
>
> "2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (*Schroeder* v. *Clifton*, 153 F. (2d) 385 (C.C.A. 10); cert. den., 328 U.S. 858)."

The report does not refer directly to the employees involved in the other branch of the *Schroeder* case, whom the court had held were not covered. But the express disapproval of coverage for the employees involved in one branch of the case, because their activities were too remote from production for commerce to sustain coverage, necessarily implies approval of the other branch, which rejected the interpretation here in question.

Absurd results follow from a different conclusion. The absurdity is best illustrated by a specific example. Suppose an industrial plant producing for interstate commerce and a road over which some interstate traffic moves are located beside the same non-navigable stream, the waters of which are undermining the roadway and the plant's property. The public authority having jurisdiction of the road and the industry each constructs a retaining wall, the former to support the roadway, the latter to protect its plant. The Congressional intent expressed in 1949 is clear that employees supplying gravel or concrete to build the wall protecting the plant property are not covered because they are engaged in an essentially local business and their activities are not closely related or directly essential to production of goods in the plant. Under the rule adopted below, the employees supplying materials for the retaining wall supporting the roadway would be covered.

All the employees are employed by the same essentially local business to perform identical operations. The functional relationship between their work and the operations of plant and road are identical. The physical location of their activities and their legal relationships with plant and public authority are identi-

cal. Is it reasonable to interpret the Act to provide for coverage in one case and not the other?

B. THE ADMINISTRATOR'S EXISTING INTERPRETATIONS ARE NOT CONSISTENT WITH THE PRINCIPLE URGED IN THIS CASE

It is well settled that if employees regularly and recurrently produce any goods for commerce, those employees are covered by the Act. This is direct coverage. That the amount of goods produced for commerce is negligible does not affect the coverage. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178. See Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. §§ 776.3 and 776.15(a).

A different rule applies, says the Administrator, where there is no production for commerce and the issue is whether employees are engaged in a closely related process or occupation directly essential to production. This is indirect coverage. Thus, the Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.19(b), states with respect to coverage of local businesses selling to producers for commerce:

> "(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce, such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.
>
> "Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of

other goods for commerce by such customers, the local merchant's employees are not doing work both 'closely related' and 'directly essential' to production, so as to bring them within the reach of the Act, merely 'because some of the customers * * * are producing goods for interstate [or foreign] commerce.' Therefore, if they do not otherwise engage 'in commerce' or in the 'production' of goods for commerce, they are not covered by the Act." (Footnotes omitted)

The Administrator contends that the employees here involved are engaged in production of goods for commerce under the direct test. But he does not apply the rule that if production for commerce is regular and recurrent, employees are covered no matter how small the quantity involved. Rather he applies the rule applicable to employees covered indirectly. In discussing the type of coverage here involved in his Interpretative Bulletin, he spells out essentially the same test as that used for local activities, generally, quoted above (29 Code Fed. Reg. § 776.21(b)(3)):

"This does not, however, necessarily mean that the production of such materials [sand, gravel, cement, etc.] within a State is *always* production 'for' commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually 'for' commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

* * *

"On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced 'for' commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods 'for' commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods 'for' commerce." (pp. 24-25)

Could anything be clearer than that the coverage here asserted is, in fact, a coverage based upon application of the indirect test of "closely related" and "directly essential" rather than the direct test of actual participation in production? These interpretations make it clear that what the Administrator is actually doing here is, as we contend, creating a combination test of coverage by which he reads into the "in commerce" branch of coverage the "closely related"

and "directly essential" test applicable only to production for commerce cases.[14]

C. THE ADMINISTRATOR PRESENTLY APPLIES HIS INTERPRETATION IN A LIMITED FIELD BUT, IF ACCEPTED, ITS SCOPE IS SUBJECT TO INDEFINITE EXTENSION

The Administrator presently applies the interpretation which is involved here to a limited number of commodities used to construct instrumentalities of commerce, telephone and telegraph poles, crushed rock, concrete, cross ties, pipe, bridge timbers and similar items, and, as already pointed out, he apparently will apply it only in cases where the production is substantial. Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.21(b).

Once the principle has been established, the limits of the coverage appear open to indefinite extension. The principle would seem applicable not merely to construction materials but to other articles necessary for activities which are regarded as "in commerce."

There is no obstacle to elimination of the requirement that production be substantial as well as regular. There is no clear basis for concluding that the principle is limited to construction materials. It may apparently be extended to any articles required and used by employees engaged "in commerce". Furthermore,

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[14] The Administrator may point out that the prohibition of shipment in commerce of "any goods" contained in Section 15(a) is not here applicable, since no goods are shipped in commerce, and conclude that there is no inconsistency in applying the quantitative test rejected in Mabee v. White Plains Publishing Co., 327 U.S. 178. Of course, application of Section 15(a) is not the test of coverage under the Act. It is inapplicable in all indirect coverage cases. The argument, if made, is merely a further recognition that we are dealing here with a newly-created type of indirect coverage.

it may apply not only to the producer but to the merchant who, by handling the goods, also becomes a producer. The local merchant who sells to the trucking company, or the electrical company, or the radio station would no longer be subject to the closely related and directly essential test, but is himself a producer for commerce whose employees are covered. The intention to leave essentially local business to local regulation has been set at naught.

It is now settled that employees engaged in new construction are neither "in commerce" nor engaged in the "production of goods for commerce". *Murphey* v. *Reed*, 335 U.S. 865. If "commerce" means instrumentalities of commerce and "for" means "to supply the need of, in order to effect", it would appear that the new construction rule also may be eaten away. By the magic of the new form of coverage, the requirement of actual participation in the movement in commerce, which is part of the "in commerce" test, and the requirement of close relationship and direct essentiality present in the "production for commerce" test will, for practical purposes, both disappear.

Clearly the result of accepting the interpretation adopted below would be to wipe out at a single stroke the limitations incorporated by Congress in the original Act, and carefully preserved in subsequent amendments. This we do not believe the Court is prepared to do.

CONCLUSION

The Association respectfully urges reversal of the judgment in this case upon the grounds set forth in this brief.

Respectfully submitted,

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